FILED
SEP 26 1966
JOHN F. DAVIS, CLERK

No. 486

In the Supreme Court of the United States

OCTOBER TERM, 1966

JOS. SCHLITZ BREWING COMPANY, *Appellant*

vs.

UNITED STATES OF AMERICA

and

GENERAL BREWING COMPANY

On Appeal from the United States District Court
For the Northern District of California
Southern Division

Motion of General Brewing Corporation to Affirm

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September 23, 1966

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Pursuant to Rule 16, Paragraph 1(c) of the Rules of this Court, General Brewing Corporation ("General Brewing") moves that the judgment of the district court be affirmed on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from the final judgment of the district court, which held that appellant Jos. Schlitz Brewing Company ("Schlitz") violated Section 7 of the Clayton Act, as amended, 64 Stat. 1125 (1950), 15 U.S.C. Section 18 (1964), by acquisitions affecting two California-based breweries. In 1961 Schlitz purchased the assets (except cash) of Burgermeister Brewing Corporation ("Burgermeister"), and in 1964 Schlitz acquired indirect control of General Brewing by purchasing 39.3 per cent of the stock of John Labatt Limited ("Labatt"), carrying with it effective control of both Labatt and General Brewing. The Labatt purchase represents the fifth acquisition of a brewing company by Schlitz since 1946, and the 65th acquisition or merger of a brewery by a competitor since the same date.[1]

The issues raised in the Jurisdictional Statement[2] of Schlitz, to be discussed below, are so devoid of substantive merit, either legally or factually, that this Court should decline at the outset to consider Schlitz's bid to delay a final decision in this case. A review of the record will

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1. In recent years, there has been a rash of mergers in the beer industry. See, *e.g.*, *United States v. Falstaff Brewing Corp.*, Civil No. 3523 (D.R.I.), filed July 13, 1965, 5 CCH Trade Reg. Rep., para. 45,065, Case 1859; *United States v. Rheingold Corp., et al.*, Civil Action No. 65, Civ. 3372 (S.D.N.Y.), filed November 9, 1965, 5 CCH Trade Reg. Rep., para. 45,065, case 1878; *United States v. Pittsburgh Brewing Corp., et al.*, Civil No. 65-1406 (W.D. Pa.), filed December 28, 1965, 5 CCH Trade Reg. Rep., para. 45,065, case 1881; *United States v. Anheuser-Busch, Inc., et al.*, Civ. 62C45(3) (E.D. Mo.), filed January 31, 1962, 5 CCH Trade Reg. Rep., para. 45,062, case 1647.

2. Throughout this Motion, the Jurisdictional Statement is cited as "J.S." References to the Findings of Fact in the Opinion of the district court, set forth in the Appendix to the Jurisdictional Statement, are cited as "F. of F." Other references to the Opinion are cited as "Op., 253 F. Supp. at . . . ." References to the trial transcript are cited as "Tr."

confirm that the district court's conclusion that Schlitz violated Section 7 of the Clayton Act, as amended, was the only conclusion at which it could arrive. The violations of Section 7 were clear-cut and blatant. In a recent beer-merger case where the evidence of an anti-competitive effect was far less compelling,[3] this Court held that a prima facie case had been presented by the government.

The "issues" which Schlitz raises in its Jurisdictional Statement were all considered by the district court and rejected in the exercise of its discretion. The "issues" are not novel and, indeed, consist solely of questions of fact slightly rephrased. These questions were passed on by the district court, and there was ample evidence to support its findings. Schlitz's Jurisdictional Statement is a desperate attempt to secure a second trial before this Court. Since the "issues" do not even pose new questions of law, they are manifestly unsubstantial and impose upon this Court's time. The Jurisdictional Statement represents, at most, a play by Schlitz for time while it moves to consolidate its position in the West Coast beer market to the detriment of competition. It is all-important to the health of the beer industry that this Court decline now to take jurisdiction rather than unwittingly assist Schlitz's anti-competitive plans.

Anti-Competitive Effects of the Acquisitions

In this case anti-competitive effects were proven by the following evidence:

An inexorable trend towards concentration presently exist[redacted] the brewing industry.[4] Since 1952 the number of

3. *United States v. Pabst Brewing Co.*, 384 U. S. 546 (1966).

4. F. of F. No. 47.

plants has decreased from 334 to 190 in 1964, and the number of companies has decreased from 307 to 144 in 1964. For the same periods, tax-paid withdrawals, one method of measuring beer production, increased from 84,293,646 barrels to 96,247,413 barrels in 1964.[5] An important part of this concentration has consisted of mergers and acquisitions, a substantial number of which involved the largest brewers.[6] In fact, a majority of the disappearing firms were large, regional breweries which stand the best chance for independent survival.[7] The share of beer sales accounted for by the 10 largest and the 25 largest breweries soared from approximately 40 per cent and 60 per cent, in 1953, to approximately 57 per cent and 82 per cent, in 1963, respectively.[8]

With its seven breweries, Schlitz rang up sales in 1964 of $311,394,654.[9] If Schlitz should be permitted to retain control over General Brewing and Burgermeister, it will become the first-ranked brewer in the United States, with over 10 per cent of the national market.[10] Anheuser-Busch, presently industry leader, and Schlitz will have garnered between themselves over 20 per cent of the national beer market, at a time of rising beer demand.[11]

The beer industry is a classic illustration of an industry where entry by new competitors is almost impossible. Con-

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5. F. of F. No. 43.

6. F. of F. No. 48.

7. *Ibid.*

8. F. of F. No. 44. Schlitz omits from its Jurisdictional Statement Appendices A-F, part of the district court's opinion, which reveal in greater detail the data supporting many of the court's findings.

9. F. of F. No. 38.

10. F. of F. No. 50.

11. *Ibid.*

struction of a new million-barrel plant runs between $30,000,000 and $35,000,000.[12] Indeed, except for a few recent Canadian challengers, it is nonexistent.[13] Only one brewery, Carlings of Canada, has successfully entered the United States market since 1947—a period of almost two decades.[14] Until Schlitz's interference, Labatt intended to become the second such entrant.

When Schlitz acquired Burgermeister, it increased its share of California sales so much that by 1962 it had jumped from tenth place, with 3.6 per cent of sales, to third ranking with 12.3 per cent of sales.[15] With control of General Brewing and Burgermeister, Schlitz's slice of the California market, which rose from 2.4 per cent to 12.1 per cent between 1954 and 1964,[16] would be a commanding 26.8 per cent of sales, making it the largest seller of beer in California and nearly twice as large as the second-ranked firm.[17]

In the Eight-Western State area,[18] the foreclosure of competition would be equally formidable. By the acquisi-

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12. F. of F. No. 49.

13. F. of F. No. 49.

14. *Ibid.*

15. F. of F. No. 105.

16. F. of F. No. 38.

17. F. of F. No. 56. This is based on 1964 figures. Schlitz's California sales have jumped to first place among California-based producers, according to recent industry records. See discussion, *infra*. Even if a Schlitz-coerced disposition of Labatt's interest in General Brewing should be sanctioned by this Court, the net effect would be the same, since General Brewing would be deprived of the considerable support which Labatt has given and promises to continue to give.

18. The Eight-Western States area consists of the contiguous States of California, Oregon, Washington, Idaho, Montana, Nevada, Utah and Arizona. Its boundaries are the Pacific Ocean, the Canadian and Mexican borders, and, approximately, the Continental Divide. F. of F. No. 18.

tions, Schlitz would dominate the area as the largest seller of beer with 23 per cent of sales.[19] In Hawaii, Schlitz would merely confirm its already monopolistic position by seizing 50.9 per cent of beer sales there.[20]

The latest available industry figures confirm the wisdom of the district court's decision. Even without considering General Brewing, Schlitz has, for the first seven months of this year, gone from fourth to third rank in California beer sales, pulling ahead of Anheuser-Busch.[21] Of the California-based producers, Schlitz is now first in sales, with 755,966 barrels out of sales of 5,846,063 barrels.[22] This marks the largest annual increase—111,148 barrels—of *any* brewer selling in California. Of the total 353,760-barrel increase in sales of beer from the same period a year ago, Schlitz has captured over 31 per cent.[23] Schlitz has posted to date a 19.3 per cent increase in California sales over a year ago, as compared with sales of other California-produced beers.[24] For the month of July 1966 alone, the hike was again the highest, almost a 25 per cent increase.[25] Thus, in gluttonous fashion, Schlitz is already exploiting the advantages which accrued to it from the

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19. F. of F. No. 55.

20. F. of F. No. 58.

21. The California Brewers Association reports, in its Statistical Report, dated August 24-25, 1966 and attached hereto as Appendix A, that Schlitz captured 12.9 per cent of all California sales in the calendar year through July 31, 1966. See Statistical Report No. 2, p. 2. This compares with 11.7 per cent of California sales the same time a year ago. For the month of July 1966, Schlitz evidenced the greatest jump in sales over its main competitors, as compared with sales for July 1965. Statistical Report No. 2, p. 1.

22. Statistical Report No. 1, p. 1.

23. Statistical Report No. 2, p. 2.

24. Statistical Report No. 1, p. 2.

25. Statistical Report No. 1, p. 2.

Burgermeister take-over. The present anti-competitive effects of the Burgermeister acquisition are so pronounced, that it requires little imagination to forecast the future adverse results likely to arise from the Labatt-General Brewing acquisition.

The Role of General Brewing

General Brewing consistently supported the government's position throughout the trial. Its sole desire is to participate, unencumbered by Schlitz, in the booming Eight-Western States, California and Hawaii beer markets, as well as the Nation.[26] It desires to compete on its own terms, freed from any control which Schlitz may exert through its control of Labatt.[27] It has long considered itself a competitor of Schlitz, and has felt confident of its ability so to compete. Having weathered fierce competition in these market areas as well as the consequences of a prolonged industry strike, General Brewing has now begun a return to its former dominant market position.[28] Further, Labatt announced repeatedly throughout the trial its pledge of continued assistance to General Brewing.

General Brewing has conducted itself throughout this litigation as it feels a competitor should. It continued to operate as a business, and to make business decisions. In

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26. Schlitz apparently concedes that the district court correctly found that all of these markets were appropriate sections of the country in which to measure the competitive effects of the acquisitions. In its Notice of Appeal to this Court, Schlitz had raised this as Question No. 5.

27. It would be a strange perversion of Congress' intent if this Court were to sanction an indirect acquisition of the stock of a corporation which professes a desire to remain a viable competitor in the market place. The issue is as simple as that.

28. General Brewing's latest income statement shows a profit of $906,146 as of June 30, 1966, compared with a loss of $507,656 as of June 30, 1965.

furtherance of this policy, following trial, but before a decision on the merits, a decision was made to sell off its Azusa, Calif., plant to Miller Brewing Company ("Miller"), and thereby cut its losses, with no adverse effect upon its ability to supply its present market demands.[29] An immediate savings of $8,000,000 resulted from this move, together with a capital gain of approximately $1,700,000. The sale of the plant meant elimination of a substantial annual overhead in the amount of $2,181,000. Schlitz was not brought in on the negotiations for this sale. There was certainly no duty on General Brewing's part to do so.[30]

General Brewing's primary goal was explained to the district court when it opposed Schlitz's motion to reopen the case. It stated its desire that General Brewing be allowed to remain in business as a viable competitor and that this case be finally decided as expeditiously as possible. If the judgment is affirmed by this Court, the presently unsettled status of General Brewing will be resolved.[31]

The Negotiations for the Labatt Stock

Although Schlitz later proclaimed innocence of any designs upon General Brewing, the testimony was scarcely

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29. Sale of the Azusa plant still leaves General Brewing with modern plants in San Francisco, Calif., Vancouver, Wash., and Salt Lake City, Utah. The sale trimmed expensive unused production capacity, with more than ample capacity to meet present and projected market demands.

30. Schlitz's real complaint is that General Brewing still acts as a competitor, while Schlitz must stand by in frustration, unable to impose its will upon Labatt vis-a-vis General Brewing.

31. By a stipulation entered into between the government and Schlitz, portions of the final judgment and decree relating to divestiture have been stayed until final disposition of the appeal of Schlitz to this Court. General Brewing did not acquiesce in this stipulation.

credible. The district court characterized Schlitz's contention as not convincing. Schlitz now repeats that it was unable to persuade the Labatt stockholders, before whom it dangled $39,000,000, to require disposition of Labatt's interest in General Brewing. This should have been easy, it would seem, if General Brewing was, as Schlitz maintains, a "failing, profitless company." Schlitz said it had only desired to invest in the Canadian beer market. Yet it proceeded in strange fashion. It offered the Labatt shareholders more than the current market price in order to obtain working control. Schlitz was prepared to pay, and in fact did pay, a premium for the shares of Labatt. Schlitz, at first, considered buying the Labatt stock at $22.50 a share, which was referred to as "a premium of about $4.00 over market."[32] In fact, Schlitz finally paid $23.00 per share. In the view of Equitable Securities Canada Limited, this price represented "an historically high level for the stock" which discounted "future growth of the Company for some years."[33] It carefully judged how much stock it would have to purchase in order to obtain control of Labatt and indirect control of General Brewing.[34] During the negotiations Schlitz's representatives pointedly asked Labatt management to refrain from introducing the Labatt brand into California,[35] which, as a premium beer, would have competed with the Schlitz brand. The proposed introduction of the Labatt brand, indeed, threatened for awhile to "kill" the Schlitz purchase of Labatt stock.[36] Schlitz simply could have insisted that Labatt's interest

32. Tr., p. 23.
33. F. of F. No. 78.
34. F. of F. Nos. 39 & 77.
35. F. of F. No. 82.
36. Tr., pp. 711-12.

in General Brewing be divested prior to its purchase. It did not do so. The president of Schlitz lamely tried to suggest a distinction between the Labatt stockholders with whom Schlitz was dealing and the Labatt board of directors, which the former controlled.[37] The district court aptly observed:

> "[I]t should be pointed out that the trial court is not convinced that from the outset of its negotiations with Labatt, Schlitz had no desire to control General Brewing. If this were true, Schlitz could have gone a great deal further in making sale of General Brewing a prerequisite for its purchase of Labatt stock."[38]

The district court thus declined Schlitz's invitation to "home-make" its own antitrust remedies.[39] Schlitz has never suggested that, at a later date, it be permitted to purchase stock in Labatt which does not give it control over General Brewing, or acquire stock in another Canadian

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37. Tr., p. 1314. This failure to require Labatt to sell its General Brewing holdings is revealing in light of Schlitz's determination to apply pressure to consummate its purpose:

> "With the hurried up approach in mind, I think we have to risk being a bit brisk with the Labatt people and simply tell them what we are about to do as soon as we are ready to do it." Defendant Schlitz's Exhibit DSX-8, p. 1.

38. Op., 253 F. Supp. at 148.

39. The district court did order each of the parties to submit a suggested form of decree. Schlitz's proposed "decree," however, avoided any attempt to propose a conditional decree such as it now requests of this Court. The full text of the Schlitz proposed decree was as follows:

> "The Government having failed to prove that the effects of the acquisition of Burgermeister Corporation by Jos. Schlitz Brewing Company in December 1961 and the purchase of 39.3 per cent of the outstanding common stock of John Labatt Limited by Jos. Schlitz Brewing Company in February 1964 may be substantially to lessen competition or tend to create a monopoly in any section of the country in any line of commerce, the complaint is hereby dismissed." Post-Trial Brief, Proposed Findings of Fact & Conclusions of Law & Proposed Decree of Jos. Schlitz Brewing Company, J.S., Appendix B.

brewer. Nor has it ever explained satisfactorily why it did not consider construction of a new brewery in Canada.

The Acquisitions

In February, 1964, Schlitz, the Nation's second largest brewer, purchased for $39,000,000 a controlling stock interest in Labatt, which in turn controls 63.5 per cent of the common stock of General Brewing.[40] Schlitz did not trouble to seek out the views of the Justice Department, or request a formal clearance, as it had done in the past.[41] Schlitz thus was able, by a single purchase, to consolidate its foothold in the growing California, Western and Hawaiian beer markets, and to eliminate a potential Canadian competitor from the United States market.

Three years previously, Schlitz had shown its interest in these expanding markets by acquiring the assets of Burgermeister. Indeed, attracted by the population growth and concomitant beer demand, several national brewers ventured into these markets.[42] Schlitz's efforts to capture a share of these markets through the Burgermeister acquisition proved initially disappointing.[43] Sales of the Schlitz-Burgermeister brands fell slightly following the Burgermeister acquisition. The combined Schlitz-Burgermeister sales in California in 1964 were 1,036,762 barrels, compared with 1,179,665 barrels in 1959. By the indirect acquisition

40. F. of F. No. 41.

41. F. of F. No. 85.

42. For example, Anheuser-Busch and Pabst have opened breweries in California in recent years. Tr., pp. 111 & 613. See also F. of F. No. 99.

43. Schlitz's own sales in California, prior to the Burgermeister acquisition, also proved disappointing. In 1955, out of total sales of 5,780,000 barrels, Schlitz had 4.01 percent of total sales in California. By 1961, this share had dropped to 3.6 per cent.

of General Brewing, Schlitz could add to its stable of breweries in these markets, eliminate two substantial competitors (Labatt and General Brewing) and over double its sales in California as of 1963.[44] Or it could, as it now proposes, deprive General Brewing of the assistance of Labatt, and thereby debilitate a strong competitor.

The government filed its suit against Schlitz as to both of the acquisitions on February 19, 1964, alleging that the acquisitions violated Section 7 of the Clayton Act, as amended, because the effect of each acquisition might be substantially to lessen competition or to tend to create a monopoly in the production and sale of beer in the United States, the Eight-Western States market, and the States of California and Hawaii. At the trial, the court heard extensive testimony over a four-week period.[45] As an aid in deciding a voluminous case of this nature, it ordered counsel for the parties to prepare summaries of each day's testimony as it related to each of 15 issues in the case. The court also directed each of the parties to submit a post-trial brief and reply brief, together with proposed findings of fact, conclusions of law and a decree.[46] After the trial, and approximately six months later, Schlitz orally requested a hearing on a motion to reopen the case for further evidence concerning the then-proposed sale of the Azusa plant of General Brewing to Miller. At that hearing the district court ordered Schlitz to prepare a writ-

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44. Plaintiff's Exhibit 32.

45. Despite its protests of a lack of preparation, Schlitz was able to introduce into evidence about 170 exhibits. Schlitz proposed a list of over 75 witnesses, and it called many of them. While extremely well-prepared for trial, Schlitz can only blame any purported lack of preparation on its sudden decision, a month or so prior to trial, to change its trial counsel.

46. Schlitz presented a 53-page post-trial brief, together with 158 proposed findings of fact and conclusions of law.

ten motion, and to demonstrate in what respect, if any, the sale would affect any of the issues in the case. At the subsequent hearing, Schlitz was unable to justify its request for an open-end reopening of the record. The most that Schlitz could show was that any evidence relating to the sale would be cumulative as to evidence already in the case. The court properly characterized the sale as a business decision on the part of General Brewing's directors, which did not change the complexion of the case, and denied the motion. Judgment was entered the following month, in which the court ordered divestiture by Schlitz of both acquisitions.

Purchase of the Labatt Shares

Schlitz labored considerably at the trial to demonstrate that the "only feasible way" to enter the Canadian market was through purchase of the Labatt stock. The district court refused to adopt any of Schlitz's proposed findings of fact in this regard. The composite which emerged at the trial was one common to both the United States and Canada. The beer industry is highly regulated everywhere. Local requirements for licenses and other restrictions are applied uniformly in Canada without discrimination. There is no discrimination against the import of U. S. beers into Canada, either through taxes or otherwise.[47] There is no need, "legally or practically," of association with a Canadian brewery for an American brewer to market its products successfully in Canada. The cost of building a plant of 100,000-barrel capacity in Canada would be approximately $3,500,000, and would require approximately $10,-

47. The fact of the matter is that American-made beers have not appealed to the Canadian taste. Pabst Brewing Company was unsuccessful for this reason. Tr., pp. 1995, 1999-2028.

000,000 for the first few years of operation before breaking even. This would be far less than the total price paid by Schlitz for the Labatt stock. Expenditure of $39,000,000, the cost to Schlitz for the Labatt stock, would certainly have sufficed for Schlitz's entry into the Canadian market through construction of a new brewing facility. It would have faced no obstacle in obtaining a license to construct such a plant. Nor are there insurmountable difficulties in distribution of American products throughout Canada. The testimony of Mr. John B. Cronyn, executive vice president and member of the board of directors of Labatt, was unequivocal that an American brewer can enter the Canadian beer market, if it so desires, by constructing a modern plant.[48]

Schlitz was correctly advised by the Labatt management that its acquisition of the Labatt stock would meet with an adverse reaction from the Canadian public,[49] yet it persisted in proceeding with the purchase.

The Temporary Restraining Order

Schlitz repeatedly asked the district court to suspend the restraining order so that it could arrange for disposition of the General Brewing stock by Labatt. Schlitz misstates, however, the reason for the unanimous opposition to such a suspension. If Schlitz had been able to exercise control over Labatt, it could have arranged a sale of General Brewing in a manner detrimental to General Brewing, quite aside from any other anti-competitive moves inherent in such control. In so doing, Schlitz could have accomplished the very purposes for which it undertook the Labatt purchase originally. It could have terminated Labatt

48. See Tr., pp. 1992 et seq.

49. F. of F. No. 79.

as a potential entrant into the United States beer market, and it could have seriously weakened General Brewing's efforts to compete against Schlitz and Burgermeister. In effect, Schlitz could have emasculated any decree the district court would eventually enter. Not unexpectedly, the district court denied Schlitz's motions.

The very purpose of the restraining order was to remove Labatt from the adverse influence of Schlitz. Schlitz was well aware of the antitrust implications of its purchase,[50] and assumed a calculated businessman's risk. During the period following the temporary restraining order, changes in the normal course of business were made in the Labatt organization. The changes which Schlitz enumerates in its Jurisdictional Statement — the reorganization of Labatt into a holding company, the transfer of brewing operations to a subsidiary, the sale of real estate, acquisitions of non-brewing properties and joint ventures with European brewers — were, however, never issues in this case. The activity which Labatt undertook with respect to General Brewing *was,* on the other hand, an issue in the case, and it developed that Labatt promised to continue to render technological and other valuable assistance to General Brewing,[51] including granting of a franchise license of the Labatt brand in the Western portion of the United States.[52]

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50. F. of F. No. 80.

51. The district court found as follows:
"In connection with the plans to expand General Brewing, and also in its role as the parent corporation, Labatt has given extensive practical and technical assistance to General Brewing of great value to the latter." F. of F. No. 63.

52. F. of F. No. 64. In any event, although never an issue in in the case, Schlitz's misrepresentation that General Brewing was made the beneficiary of an "illicit division of world beer market" should not go unanswered. The fact is that General Brewing has no connection whatsoever with any international agreements to divide world beer markets.

The Issues Respecting the Labatt Shares

Schlitz, thus, has repeatedly sought leave to arrange for a private, unsupervised dumping of General Brewing on the open market. The government and General Brewing have opposed this move since it would not only weaken a strong competitor of Schlitz in California, Hawaii and the Eight-Western State areas, but would remove Labatt as a *potential* competitor in the United States. Labatt management testified that Labatt intends to enter this country by utilizing its General Brewing holdings as a vehicle. The plan is to move the General Brewing and Labatt brands into the Eastern market. The program envisaged by them entails close cooperation between Labatt and General Brewing.[53] The court itself expressly found that Labatt's plans represent substantial potential competition in the United States, the Eight-Western States and California "which will be eliminated if Schlitz is allowed to control Labatt."[54] Schlitz's "generous" offer to require Labatt to dispose of its interest in General Brewing was thus received by everyone concerned with justified skepticism. Could any course of conduct be better calculated to injure General Brewing as a competitor of Schlitz? General Brewing, Labatt, the government and the district court have all turned down this inducement, since the whole purpose of this action is to permit Labatt and General Brewing to carry on, unimpeded, in their plans for participating in the growing United States beer market.[55]

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53. It entirely misses the point, then, to urge that Schlitz and Labatt are not potential substantial competitors or that no witness "believed that Schlitz control of Labatt standing alone posed any such threat [to competition in the brewing industry]." J.S., p. 9.

54. F. of F. No. 66. See also F. of F. No. 67.

55. This is the manner in which the Carlings and Molson breweries of Canada have entered the U. S. market.

Schlitz raised at trial a point which was wholly extraneous to this action. Schlitz contended that General Brewing's performance in its market areas—which underwent a temporary decline—was attributable to Labatt influence, and hinted darkly at an invidious agreement between the two to lose money deliberately. Schlitz stumbled rather awkwardly on the problem of causation, particularly since the General Brewing board of directors has acted independently at all times of the Labatt board of directors. Schlitz also overlooked fierce competition which General Brewing has encountered in its markets. California, the Eight-Western States and Hawaii have unarguably become, in the past ten years or so, arenas of intense infighting among beer manufacturers.[56] General Brewing also was an unwilling victim of a crippling industry strike in California in 1964. General Brewing's earnings record prior to filing of the present action was notable.[57] The uncertainty created by this litigation has necessarily affected the morale of its executives. Another reason for its temporary losses is that General Brewing was forced to reduce prices to meet the competition of Schlitz.[58]

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56. California, for example, has shown an increased beer consumption since 1947 by a substantial amount, whereas there has been a shortage in other large beer-consuming-states such as New York and Pennsylvania. Tr., pp. 960-961. California is regarded as an "extremely important segment" of the market. Tr., p. 960. Sales by the barrel in California rocketed from 1,826,929 barrels in 1934 to 9,152,908 barrels in 1964. Opinion, Appendix C. Beer companies, particularly the nationals, eye California today as a focal point of most effective and "strong" competition between beer manufacturers. Indeed, the rapid increase in California's population "has effectively directed all competition to work on California as a market in itself." Tr., p. 487.

57. General Brewing showed a profit of $1,150,532 in 1963, the year immediately prior to the filing, and even greater profits for many years preceding such filing. In 1964 it incurred its first loss in approximately 25 years. Defendant Schlitz's Exhibit 199, p. 4.

58. Tr., pp. 1447-48.

Since then General Brewing's performance has markedly improved. By selling its Azusa plant, without decreasing its ability to meet sales, General Brewing realized an immediate receipt of cash as well as a large capital gain, and trimmed overhead and retired a loan, thereby eliminating a substantial amount of annual interest. The most recent income statement of General Brewing shows an increase in sales and income over a year ago. Labatt has stated its intent to expand General Brewing.

The district court correctly observed that evidence of General Brewing's temporary financial embarrassment in competitive markets was outside the issues of this case. The real issue is whether Labatt offers promise as a potential competitor of Schlitz in the United States. Evidence on this point was supplied by testimony of the Labatt management, such as Mr. John B. Cronyn. Mr. Cronyn reiterated the firm Labatt commitment to assist and expand General Brewing in its operations.[59] The relative success of this assistance in the past is beside the point.[60]

Sale of the Azusa Plant

The court was presented with considerable data concerning the sale of the Azusa brewery to Miller. General Brewing submitted a detailed affidavit by its president, together with copies of Miller's offer to purchase and the resolution of acceptance. Counsel for General Brewing offered, in fact, to call Mr. Jess Nicks, General Brewing's president, to testify at the hearing, if necessary. There was full disclosure of the details and reasons for the trans-

59. Mr. Cronyn also submitted an affidavit in opposition to Schlitz's motion to reopen the record.

60. Schlitz intimates that the government helped thwart the purchase of General Brewing by Heilman Brewing Company. Schlitz misconstrues the form which General Brewing's eastward expansion will take. It certainly will not be by allowing itself to be swallowed up by other breweries.

action to the court. There was no disclosure to Schlitz prior to the hearing for obvious reasons.

The court characterized the sale as a business decision on the part of General Brewing management with which it chose, properly, not to interfere. It extended to counsel for Schlitz opportunities on two separate occasions to demonstrate how the transaction affected the issues in this case. It carefully evaluated Schlitz's contentions in this respect and found them lacking. In the sound exercise of its discretion, the court denied the motion. It found it "clear beyond cavil" that the sale was beneficial.[61]

Schlitz implies deception of the court by General Brewing. It states that the district court was led "to believe that the proceeds of the sale would be available to General Brewing for rehabilitation and possible expansion eastward."[62] This statement shades the facts. The court *was* informed, by sworn affidavit of General Brewing's president, that the proceeds would be applied against the outstanding loan,[63] thereby enabling it to eliminate heavy

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61. The court made the following observations concerning the sale:

> "(1) the agreement to sell was an exercise of General Brewing's independent business judgment, (2) consummation of the sale would leave General Brewing with more than adequate brewing capacity for all foreseeable increases in sales in all markets which it now taps, (3) General Brewing's receipt of $8,000,000 for the sale would materially strengthen its capacity to compete with all its competitors, including, notably, Schlitz, (4) the sale would improve General Brewing's ability to expand into other areas and (5) it would strengthen General Brewing as a vehicle for Labatt's competition in the U. S. market." Op., 253 F. Supp. at 132.

62. J.S., p. 11.

63. See Affidavit of Jess Nicks in Opposition to Motion to Reopen Record, p. 4:

> "Northwestern . . . had already consented to the sale upon condition that its loan be paid off. We are now making arrangements to pay off such loan in its entirety and in so doing we will save more than $450,000 in interest per year."

interest charges. The court recognized that the sale also aided General Brewing's rehabilitation by cutting down costly overhead. The court was not misled, but was fully informed of the intended use of the funds. It also was informed of the other substantial benefits accruing from the sale. The net effect was that General Brewing has been able to rehabilitate itself and, as soon as this litigation is settled, it can proceed with its expansion plans. General Brewing has always "admitted" what the proceeds would be used for, long prior to the other lawsuit referred to.[64]

The Acquisition of Burgermeister's Assets

At the time of the Schlitz acquisition, Burgermeister was a substantial, independent competitor, with substantial assets and modern brewing equipment.[65] In 1960, it was the third largest selling California brewery, accounting for 10.7 per cent of California's sales.[66] Schlitz has never contended that Burgermeister was a so-called "failing corporation."[67] Schlitz valued Burgermeister enough to outbid Miller Brewing Company by over $1,000,000, and paid over $12,000,000 for the Burgermeister assets.

Acquiring Burgermeister meant a lot to Schlitz. It was able to enter the Western beer market more effectively without expanding its own brewery or, as it had initially considered, introducing its Old Milwaukee popular-price beer.[68] It was also now able to offer a popular-price beer

64. The other lawsuit, *General Brewing Corp. v. Jos. Schlitz Brewing Co.*, Civil No. 42874 (N.D. Cal.), filed October 8, 1964, is a private treble-damage action by General Brewing against Schlitz for over $1,000,000 for regional price discrimination.

65. F. of F. Nos. 90 & 106.

66. F. of F. No. 86.

67. The district court made several findings of fact which demonstrate Burgermeister's essentially sound position at the time of the acquisition. See F. of F. Nos. 88-98.

68. F. of F. Nos. 113-18.

to its distributors, and thus concentrate both a premium and a popular-price beer within the more successful distributor outlets. And, unfortunately for General Brewing, it was able to cut more strongly into General Brewing's sales. Before the Burgermeister acquisition, one of Schlitz's officers, speculating on the effect of Schlitz's West Coast takeover, observed in an inter-office memorandum, "We could choose either the Schlitz or Burgie wholesaler. L. L. [Lucky Lager?] cannot do anything about it."[69]

Schlitz has long displayed anti-competitive tendencies in the California, Hawaiian and Eight-Western State markets as well as the Nation. Shortly after it had purchased the assets of Burgermeister, an apt description of the growing Schlitz empire appeared, with the blessing of Schlitz:

> "Schlitz intends to grow not merely by gobbling up or 'cannibalizing' some of the 225 surviving U. S. brewers, but by selling against them more strongly on national, regional and local levels."[70]

At the trial the president of Schlitz confirmed that description to be a correct statement of his company's goals. One wonders whether Schlitz informed the Antitrust Division of the Justice Department of these goals at its conference *prior to the Burgermeister acquisition.*

After the Burgermeister acquisition, Schlitz attempted to have its wholesalers carry a full line of Schlitz products.[71] This was in line with Schlitz's view that its wholesalers carry only its own brands.[72] Indeed, its president unwittingly revealed his company's preferences:

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69. Plaintiff's Exhibit 2; Tr., pp. 7-8.

70. Article, Sales Management, "How to 'General Motorize' a Beer Business" (August 17, 1962). Plaintiff's Exhibit 47.

71. F. of F. No. 107.

72. Tr., pp. 1270-71.

"As markets go down in size, it is very important for a wholesaler to have perhaps two or even more than two brands. So from a policy standpoint it would be nice if wholesalers could handle only one corporation brand."[73]

Schlitz moved quickly to consolidate the distributors of Burgermeister and Schlitz. This anti-competitive development radiated in turn further anti-competitive effects. Miller, for example, felt the consequences at any early stage, as many of its distributors lost the Burgermeister brand, and still others dropped the Miller brand.[74] By its impact on distributorship arrangements, the Burgermeister acquisition lessened the availability of other brands to retail outlets and consumers.

General Brewing was also injured by the Burgermeister acquisition. Its Los Angeles distributors, for example, lost the Schlitz brand.[75] A former president of General Brewing testified that as a result the distributors became less effective so that General Brewing's sales suffered a decline.[76]

In the first six months following the acquisition of Burgermeister, Schlitz, on its own initiative, terminated its relationship with 39 beer distributors in various market areas of the West. Of these, 14 were former Burgermeister distributors and 25 were former Schlitz distributors.[77]

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73. Tr., p. 1271.

74. The president of Miller testified that the Schlitz acquisition of Burgermeister had a definite, adverse effect on its distributors, and predicted that in the next five to ten years there would be an even further adverse effect "when the concentration of beer will tend towards the same brewery having one distributor handle its products in a given area." Tr., pp. 302-303.

75. Tr., pp. 1196-97.

76. Tr., p. 1203.

77. F. of F. No. 109.

Schlitz did meet with the Antitrust Division prior to the acquisition, but no positive action developed. Schlitz did not submit a written report for a written clearance, and it received no clearance.[78] Yet Schlitz has been acquainted with the Division's procedure in other contexts, since it merged with a Hawaiian and a Puerto Rican brewery only after obtaining written clearance.[79] In any event, oral clearances for mergers or acquisitions are simply not furnished by the Division.[80]

Schlitz makes the somewhat incomprehensible observation[81] that "on the facts of this case," there was no market share as to combined Schlitz-Burgermeister-General Brewing sales for the district court to consider as to both acquisitions. It would have been artificial in the extreme to consider Schlitz's market shares apart from Burgermeister in evaluating the anti-competitive effects of the Labatt-General Brewing acquisition. Schlitz offered no breakdown of sales as between the Schlitz and the Burgermeister brands after the 1961 purchase. As to gauging the effects of the Burgermeister acquisition, inclusion of the subsequent market shares of General Brewing could be considered as post-acquisition evidence confirming the probability of future anti-competitive effects. The Labatt-General Brewing acquisition occurred only three years after the Burgermeister acquisition. But more to the point, in considering the effect of the Burgermeister acquisition in each of the relevant market areas, the court relied upon market data

78. F. of F. No. 84.
79. F. of F. No. 85.
80. F. of F. No. 86.
81. J.S., p. 16, first footnote.

only as to Burgermeister's and Schlitz's sales (and not General Brewing's) as of the time of the purchase.[82]

The Procedures Below

Schlitz came fully prepared to trial. Schlitz introduced considerably more exhibits than the government and General Brewing together, and called more witnesses. The trial did not commence until 18 months after the action had been brought. Prior to trial, Schlitz invoked several discovery tools made available by the Federal Rules of Civil Procedure, although it allowed 11 months to lapse from the date of filing before making its first discovery moves. It submitted several written interrogatories to the government and General Brewing. It obtained production of several documents. Schlitz also utilized information obtained through a companion private treble-damage suit filed by General Brewing against Schlitz for regional price discrimination by Schlitz.[83]

The court's denial of Schlitz's motion to require General Brewing to furnish copies of documents came only after General Brewing had informed the court that it would comply with Schlitz's request except for revealing certain trade secrets. These documents were provided to Schlitz, and Schlitz used some of them in cross-examination of witnesses.

Schlitz must be somewhat uncomfortable in charging that it was prejudiced by lack of preparation. If it experienced any such inconvenience, it was self-inflicted. Schlitz deliberately changed its chief trial attorney only about 30 days before trial. Also, Schlitz asked for, and received,

82. See, *e.g.*, F. of F. Nos. 88, 101, 102, and 105.

83. *General Brewing Corp. v. Jos. Schlitz Brewing Co.*, Civil No. 42874 (N.D. Cal.), filed October 8, 1964.

four separate extensions of time for further discovery under Local Rule 2(a). None of its requests for additional time was denied.[84] And at the last minute it filed its motion to produce documents.

Schlitz hints that it might have uncovered Labatt's "true plans" for General Brewing if it had been allowed further discovery. But it does not explain how any information in the hands of General Brewing's executives would reflect the plans of Labatt management for General Brewing. Labatt's management testified, both at trial and by subsequent affidavit, of the company's true plans for General Brewing—to expand its commitment in the United States. Since the trial, the Labatt board of directors has not altered that position. Only two weeks prior to the filing of this Motion to Affirm, General Brewing's board adopted a resolution formally declaring that divestiture of control of General Brewing by Labatt at this time could have the effect of substantially reducing the sales and profits of this corporation and adversely affecting employee and executive morale, and the morale of wholesalers.[85]

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84. Schlitz's first extension of time, granted eight months after filing of the action, was until January 12, 1965. The other extensions were until March 16, 1965, March 29, 1965 and April 26, 1965, respectively.

85. This resolution was passed, by a vote of 6-2, at a special Board meeting held September 14, 1966 at the demand of two dissident directors. These latter directors were elected on April 6, 1966 by the votes of a minority shareholder who also owns Maier Brewing Company, a competitor of General Brewing. One is compelled to inquire: Have Schlitz and Maier Brewing been in communication regarding this suit?

THE QUESTIONS ARE MANIFESTLY UNSUBSTANTIAL

I.

Where Competition Is Adversely Affected Section 7 of the Clayton Act, as Amended, Forbids Acquisition of a Corporation, Whether Directly or Indirectly, Irrespective of Beneficial Effects, and It Would Be a Misinterpretation of the Statute to Entrust a Violator with Power to Devise Its Own Divestiture Remedies.

The district court expressed misgivings about the true motives of Schlitz's purchase of the Labatt stock. Assuming, though, that the purchase did in fact contemplate entry into the Canadian market, the law is clear that a merger or acquisition otherwise violative of Section 7 of the Clayton Act, as amended, is not cured by beneficial side effects. The theory of "countervailing power" has been expressly rejected by this Court. *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 370 (1963); *United States v. Bethlehem Steel Corp.,* 168 F. Supp. 576, 617-18 (S.D.N.Y. 1958). Nor do good intentions or motives insulate an otherwise proscribed acquisition. *United States v. E. I. du Pont de Nemours & Co.,* 353 U.S. 586, 601-02 (1957). The circumstance that Labatt is a foreign corporation does not affect this conclusion. The sole issue, as to the Labatt-General Brewing acquisition, is whether the reasonably probable effect of the acquisition will be to substantially lessen competition or tend to create a monopoly in the production and sale of beer in any of the relevant market areas. The district court had little difficulty in applying the principles first articulated by this Court in *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962). The most recent applications of Section 7 by this Court[86] reinforce the correctness of the district court's decision. Schlitz cannot now

86. *United States v. Von's Grocery Co.,* 384 U.S. 270 (1966) and *United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966).

bifurcate the package it bought by divorcing General Brewing from this Court's consideration of the whole transaction. If an acquisition violates Section 7 in any respect, then it must fall.

Schlitz's suggestion[87] for a private disposition of Labatt's General Brewing interest is simply unworkable. The district court readily concluded that.[88] It is not the province of a court, in applying the sanctions of Section 7, to create new antitrust problems. See *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 333 (1961). There is certainly no justification for permitting a violator of Section 7 to promote its own schemes for avoiding the proscriptions of the statute. *Cf. Matter of Diamond Alkali Co.*, Docket No. 8572, 3 CCH Trade Reg. Rep., para. 17,361 at pp. 22,577-78 (1965). Fashioning of the appropriate remedy properly belonged to the district court. *United States v. E. I. du Pont de Nemours & Co., supra* at 322.[89]

But the true vice of the question as posed by Schlitz is its studied avoidance of the district court's finding that Labatt is a potential competitor of Schlitz in the United States, regardless of its present sales volume in the United States. This Court has consistently held that potential competition also must be zealously safeguarded. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

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87. As noted previously, Schlitz's proposed decree made no suggestion of a conditional decree of divestiture.

88. Op., 253 F. Supp. at 148.

89. In the *du Pont* case, the district court's decree did not go far enough to redress the injury to competition. In *United States v. Crescent Amusement Co.*, 323 U. S. 173 (1944), the circumstance that the district judge had initially found a violation of law was said to enhance the deference owed to the district judge's determination of the measures appropriate to eliminate the violation. That factor was not present in the *du Pont* case. See *United States v. E. I. du Pont de Nemours & Co., supra* at 322 note 3.

II.

Antitrust Division's Three-Year Delay in Challenging the Burgermeister Acquisition Is Irrelevant, and Burgermeister Was Not Subject to the "Failing Corporation" Doctrine.

The district court was fully apprised by Schlitz of the latter's conference with the Antitrust Division prior to purchasing Burgermeister, and doubtless gave full consideration to this factor in its decision. In all events, inaction at the time by the Antitrust Division carries little evidentiary weight, particularly in view of the clear procedure for obtaining written clearances which Schlitz, as a businessman, knew about and chose to ignore. The lapse of only three years before the complaint was filed against Schlitz is almost insignificant when compared with other cases. *Cf. United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961).

If there was insufficient evidence by which to gauge the future effects of the Burgermeister acquisition in 1961, there certainly was ample evidence by 1964, when Schlitz resumed its policy of acquiring competitors in the context of an industry marked by a rapidly diminishing number of competitors. Post-acquisition events cast a more precise light upon the probable anti-competitive effects of an acquisition, and under all the circumstances then present in 1964, the Antitrust Division responded and filed its complaint.

It may be that a businessman's "orderly conduct of affairs" is indeed disrupted by late-coming antitrust action. But it

> "is enough [for this Court] that Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would, slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition

> would thereby be destroyed. Congress passed the Celler-Kefauver Act to prevent such a destruction of competition. Our cases since the passage of that Act have faithfully endeavored to enforce this congressional command."[90]

Schlitz weakly requests this Court to review the procedure by which clearances are granted by the Antitrust Division. Schlitz does not ask that this Court lay down new rules for the proper role of such clearances. It is already clear that the government cannot be estopped to move against a proscribed merger or acquisition. *United States v. New Orleans Chapter, Associated Gen. Contractors,* 382 U.S. 17 (1965). The gist of Schlitz's request, for which no authority is cited, is rather as follows:

> "We do maintain, however, that a pre-merger clearance of the kind present here is entitled to evidentiary consideration in the event the government subsequently files suit and that some justification or change in circumstances should appear from the record if the evidence adduced in support of the complaint is the same information the Antitrust Division had before at the outset."[91]

The simple answer to this request is that the district court did take the Antitrust Division's inaction into consideration.[92] Also, there had been extensive change in the circumstances since the time the Burgermeister acquisition was first evaluated by the Antitrust Division. It should suffice to enumerate only a few of these: The continued trend towards concentration in the beer industry, and Schlitz's

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90. *United States v. Von's Grocery Co.,* 384 U. S. 270, 278 (1966).

91. J.S., p. 22.

92. F. of F. Nos. 83-86.

subsequent acquisition of Labatt and General Brewing. It would be unwarranted for the Antitrust Division to view the Burgermeister acquisition in a vacuum, artificially fixed at a prior point in time.

Schlitz's reliance on the recent case of *United States v. Von's Grocery Co.*,[93] is misplaced. The opinion in that case expressly noted that the merger there could not be defended on the ground that "one of the companies was about to fail or that the two had to merge to save themselves from destruction by some larger and more powerful competitor."[94] As the district court in the instant case found, Burgermeister was not insolvent and thus was not a "failing firm" within the meaning of *International Shoe Co. v. F.T.C.*, 280 U.S. 291 (1930). It was not even "deteriorating." And the duo certainly did not have to combine in order to fend off a more powerful competitor.

> "If ever such a merger would not violate § 7, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with power to do so, declared must be arrested."[95]

Schlitz now argues that post-acquisition data "confirmed the wisdom of the Antitrust Division's 1961 assessment."[96] If anything, post-acquisition facts confirm the wisdom of the Antitrust Division's 1964 assessment, since, as already pointed out, Schlitz proceeded, in the same market areas, to acquire another competitor and has increased its share

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93. 384 U.S. 270 (1966).

94. *Id.* at 277. (Footnote omitted.)

95. *Id.* at 278.

96. J.S., p. 23.

of sales there. Further, as noted in *F.T.C. v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965):

> "If the post-acquisition evidence were given conclusive weight or allowed to override all probabilities, then acquisitions would go forward willy-nilly, the parties biding their time . . . . [T]he force of § 7 is still in probabilities, not in what transpired. That must necessarily be the case, for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger."

III.

Schlitz Was Not Foreclosed to Its Prejudice from Effective Pre-Trial Discovery, and the Trial Court Properly Refused to Reopen the Record in the Exercise of Its Discretion.

Schlitz was able to present evidence relating to all of the issues in this case. It marshalled more exhibits and more witnesses than the government and General Brewing combined. It even used the vehicle of a companion private-treble damage suit filed by General Brewing against it to develop further evidence in this case. The court acted within its discretion in denying Schlitz's motion for further discovery, particularly after having granted four previous motions for extensions of time for Schlitz to prepare for trial, and the reviewing court in such circumstances should not decide whether it would, in the first instance, have permitted the discovery prayed for, but whether there is evidence to support the decision. *Tiedman v. American Pigment Corp.*, 253 F.2d 803, 808 (4th Cir. 1958).

What Schlitz really complains about is that it was unable to exert its voting control over Labatt long enough to have the latter's interest in General Brewing disposed of, thereby permitting Schlitz to accomplish its goals of eliminating substantial competition in the Western markets. The government and General Brewing naturally resisted all such at-

tempts to influence Labatt management, and the court acted within its discretion in denying any modification of the temporary restraining order. *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 523 (3d Cir. 1963); *United States v. Pennzoil Co.*, 252 F. Supp. 962, 986 (W.D. Pa. 1965).

Further, the district court did consider evidence relating to the sale of the Azusa plant by General Brewing to Miller. Schlitz was given two separate occasions on which to show how any evidence relating to the sale could affect any of the issues in this case. Counsel for Schlitz could only speculate at most, and assert that the sale "proved" its contentions that Labatt meant to destroy General Brewing. Yet General Brewing's president submitted concrete facts showing the clear and immediate financial advantages accruing from the sale, and Labatt management reaffirmed its intent to assist General Brewing. It is difficult to imagine what Schlitz could have accomplished if it had been granted its request for an unlimited reopening of the record. The only certain result would have been further delay in the disposition of this case to the detriment of General Brewing. For this reason, General Brewing opposed the request.

After a case is closed, the decision of whether or not it should be reopened lies within the sound discretion of the trial court. *Reconstruction Fin. Corp. v. Commercial Union of America Corp.*, 123 F. Supp. 748, 750 (S.D.N.Y. 1954). Since the trial court "has the feel for the case that an appellate court can seldom have . . ., [its] ruling is subject to reversal only in a rare case where abuse is clearly shown . . . ." *Caracci v. Brother Int'l Sewing Mach. Corp.*, 222 F. Supp. 769, 771 (E.D. La. 1963), *aff'd*, 341 F.2d 377 (5th Cir. 1965). Schlitz's request was not limited, but sought an open-end reopening of the record. If Section 7 cases are to foster competition rather than stifle it, there must be a decision at

some point rather than unsettling uncertainty. *Cf. United States v. Imperial Chem. Indus., Ltd.*, 1957 Trade Cases, para. 68,859 at p. 73,476 (S.D.N.Y. 1957). Protracted antitrust litigation should be concluded as soon as possible. *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 335 (1961).

IV.

The Trial Court's Findings of Fact and Conclusions of Law Were Properly Made.

Perhaps stung by its total inability to produce *credible* evidence to support its unrealistic contentions at trial, Schlitz now impugns the findings of fact and conclusions of law at which the district court arrived. It makes the unsupported assertion that the findings of fact and conclusions of law entered below were not prepared by the district court.

The district court ordered all of the parties to submit proposed findings of fact and conclusions of law as part of their post-trial submission. Schlitz, voicing no objection to this procedure, lodged 158 proposed findings of fact and conclusions of law with the court. The district court expressly stated in its opinion that it had reviewed each of the parties' submissions:

> "Each set has been reviewed by the trial court. While those proposed by the United States and by General Brewing have provided the basic pattern for the trial court's own Findings and Conclusions, *the latter are the product of careful sifting.* They incorporate many substantial additions, deletions and revisions as well as numerous other changes including citations to the record. It is believed that the Findings, Conclusions and comments show the reasoning which led this court to its decision on all relevant issues."[97]

97. Op., 253 F. Supp. at 131. (Emphasis added.)

The situation in the present case is markedly different from *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964), where the trial judge had not written an opinion but had requested prevailing counsel to prepare the findings, conclusions and judgment, which it adopted verbatim. Nevertheless, this Court in that case still concluded that "those findings, though not the product of the working of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence."[98] In this case all of the parties were required to submit summaries of the trial transcript for the preceding days, and the district court was elaborately informed with respect to the significance of all proferred evidence. Finally, no one who reads the transcript can in good faith argue with the proposition that the trial judge reached his own decisions in frequent disagreement with the parties. The truth is that the findings and conclusions are the product of the court.

CONCLUSION

The Jurisdictional Statement of Schlitz does not raise novel issues of law, but is predicated solely upon assumption of facts decided adversely to Schlitz, which it now seeks to relitigate in this Court. For these reasons, the judgment of the district court should be affirmed on the ground that it is manifest that the questions on which the

98. *Id.* at 656.

decision of this cause depends are so unsubstantial as not to need further argument.

Dated: September 23, 1966.

Respectfully submitted,

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Of Counsel

Appendix A

CALIFORNIA BREWERS ASSOCIATION

155 Montgomery Street, San Francisco, California 94104

August 24, 1966

To: Members and Directors of the
California Brewers Association

Re: Statistical Report #1—Sales of Beer Produced in California—Month of July, 1966

Attached for your information and files is the California Brewers Association STATISTICAL REPORT #1—SALES OF BEER PRODUCED IN CALIFORNIA—for the month of July, 1966, and calendar year to date.

Very truly yours,

/s/ GEO. W. OSOSKE
Geo. W. Ososke
Executive Secretary

CALIFORNIA BREWERS ASSOCIATION

155 Montgomery Street, San Francisco, California 94104

Statistical Report #1, Page 1

Sales of Beer Produced in California
(In Barrels)

Month of July, 1966

California Breweries	Through July 31, 1966 — Calif. Sales & Exports	Through July 31, 1966 — Calif. Sales	MONTH OF JULY — Calif. Sales & Exports 1966	MONTH OF JULY — California Sales 1966	MONTH OF JULY — California Sales 1965	MONTH OF JULY — EXPORTS 1966	MONTH OF JULY — EXPORTS 1965
Jos. Schlitz	1,054,424	751,853	184,932	133,896	104,727	51,036	31,168
Anheuser-Busch	1,113,266	728,629	163,448	111,396	107,662	52,052	51,584
Theo. Hamm	801,371	641,385	134,559	110,050	97,076	24,509	27,774
General Brewing	721,296	581,325	115,228	92,317	92,452	22,911	18,868
Pabst Brewing	496,593	326,289	74,986	51,840	59,717	23,146	22,409
Maier Brewing	287,587	272,393	42,093	39,439	49,933	2,654	3,340
Falstaff Brewing	293,929	181,401	38,523	28,391	25,902	10,132	8,154
Grace Bros.	60,307	56,863	8,963	8,593	11,752	370	261
Steam Beer	707	707	107	107	85	—	—
	4,829,480	3,540,845	762,839	576,029	549,306	186,810	163,558

California Production (Exports included)

Percentage Packaged Beer—JULY 1966—81.51% JULY 1965—79.89%
Percentage Draught Beer—JULY 1966—18.49% JULY 1965—20.11%

CUMULATIVE SALES

	California Breweries
In California to date, 1966	3,540,845
In California, same period 1965	3,356,890
INCREASE	183,955
Percent	5.5%

(Page 2)

Sales of Beer Produced in California

January 1 through July 31, 1966

(In Barrels)

	COMPARATIVE CALIFORNIA SALES — Through July 31		— Increase or Decrease —		Exports — Through July 31	
	1966	1965	Barrels	Percent	1966	1965
Jos. Schlitz	751,853	630,018	121,835	19.3%	302,571	202,465
Anheuser-Busch	728,629	684,495	44,134	6.4	384,637	320,349
Theo. Hamm	641,385	564,187	77,198	13.7	159,986	144,816
General Brewing	581,325	569,342	11,983	2.1	139,971	123,608
Pabst Brewing	326,289	350,396	—24,107	— 6.9	170,304	88,142
Maier Brewing	272,393	315,966	—43,573	—13.8	15,194	17,334
Falstaff Brewing	181,401	166,408	14,993	9.0	112,528	65,563
Grace Bros.	56,863	75,569	—18,706	—24.8	3,444	1,939
Steam Beer	707	509	198	38.9	—	—
Totals	3,540,845	3,356,890	183,955	5.5%	1,288,635	964,216

Sales by California Breweries*

(In Gallons)

Month of July, 1966

	California Taxable Sales	Export Sales	California — Military Sales — Direct	By Distrs.	Total Sales	Percent of Total	Bottles & Cans	Draught
Jos. Schlitz	4,035,845	1,582,108	6,300	108,629	5,732,882	24.24	4,862,262	870,620
Anheuser-Busch	3,386,474	1,613,622	11,529	55,276	5,066,901	21.43	3,442,524	1,624,377
Theo. Hamm	3,253,896	759,765		157,663	4,171,324	17.64	3,511,047	660,277
General Brewing	2,806,108	710,236		55,722	3,572,066	15.11	3,102,400	469,666
Pabst Brewing	1,551,801	717,523	4,713	50,536	2,324,573	9.83	1,784,258	540,315
Maier Brewing	1,216,146	82,275	6,361	101	1,304,883	5.52	1,292,002	12,881
Falstaff Brewing	816,429	314,096	17,674	46,012	1,194,211	5.05	1,004,127	190,084
Grace Bros.	266,368	11,494			277,862	1.17	276,397	1,465
Steam Beer	3,317				3,317	.01		3,317
	17,336,384	5,791,119	46,577	473,939	23,648,019	100.00	19,275,017	4,373,002

*California law presumes that beer is sold upon removal from the Internal Revenue Bonded Premises; consequently this report does not necessarily reflect actual sales or consumption.

CALIFORNIA BREWERS ASSOCIATION

155 Montgomery Street, San Francisco, California 94104

August 25, 1966

To: Members and Directors of the
California Brewers Association

Re: Statistical Report #2—Total Beer Sales in California
Including Imports—Month of July, 1966

Attached for your information and files, is the California Brewers Association STATISTICAL REPORT #2—TOTAL BEER SALES IN CALIFORNIA INCLUDING IMPORTS—for the month of JULY, 1966, and calendar year to date.

Very truly yours,

/s/ GEO. W. OSOSKE
Geo. W. Ososke
Executive Secretary

California Brewers Association
Statistical Report #2, Page 1
August 25, 1966

Total Beer Sales in California Including Imports
Months of July 1966 and July 1965
(In Barrels)

Brewing Companies	MONTH OF JULY 1966 — Calif. Production Sold in Calif.	Shipments into Calif.	Total Sales in Calif. Barrels	Total Sales in Calif. Percent of Total	MONTH OF JULY 1965 — Calif. Production Sold in Calif.	Shipments into Calif.	Total Sales in Calif. Barrels	Total Sales in Calif. Percent of Total	July 1966/July 1965 — Total Sales in Calif. — Increase or Decrease — Barrels	Percent
1. Adolph Coors	—	170,752	170,752	17.5%	—	171,343	171,343	18.5%	— 591	— 0.3%
2. Olympia Brewing	—	150,298	150,298	15.4	—	139,646	139,646	15.1	10,652	7.6
3. Jos. Schlitz	133,896	1,012	134,908	13.8	104,727	2,046	106,773	11.5	28,135	26.4
4. Anheuser-Busch	111,396	869	112,265	11.5	107,662	777	108,439	11.7	3,826	3.5
5. Theo. Hamm	110,050	169	110,219	11.3	97,076	—	97,076	10.5	13,143	13.5
6. General Brewing	92,317	13,909	106,226	10.9	92,452	91	92,543	10.0	13,683	14.8
7. Pabst Brewing	51,840	27	51,867	5.3	59,717	—	59,717	6.5	— 7,850	—13.1
8. Maier Brewing	39,439	—	39,439	4.0	49,933	—	49,933	5.3	—10,494	—21.1
9. Falstaff Brewing	28,391	—	28,391	2.9	25,902	—	25,902	2.8	2,489	9.6
10. Miller Brewing	—	21,423	21,423	2.2	—	20,274	20,274	2.2	1,149	5.7
11. National Brewing	—	10,107	10,107	1.0	—	6,478	6,478	0.7	3,629	56.0
12. Grace Bros.	8,593	—	8,593	0.9	11,752	—	11,752	1.3	— 3,159	—26.9
13. Pearl Brewing	—	8,296	8,296	0.9	—	9,818	9,818	1.1	— 1,522	—15.5
14. Sicks' Rainier	—	5,084	5,084	0.5	—	5,750	5,750	0.6	— 666	—11.6
15. Carling	—	2,682	2,682	0.3	—	4,592	4,592	0.5	— 1,910	—41.6
16. Steam Beer	107	—	107	0.0	85	—	85	0.0	22	25.9
17. Other US Co.'s	—	9,555	9,555	1.0	—	11,144	11,144	1.2	— 1,589	—14.3
18. Outside USA	—	5,869	5,869	0.6	—	4,839	4,839	0.5	1,030	21.3
Total Sales	576,029	400,052	976,081	100.0%	549,306	376,798	926,104	100.0%	49,977	5.4%
Percentages	59.0%	41.0%	100.0%		59.3%	40.7%	100.0%			

California Brewers Association
Statistical Report #2, Page 2
August 25, 1966

Total Beer Sales in California Including Imports
(In Barrels)
In Calendar Year to July 31, 1966 and July 31, 1965

Brewing Companies	YEAR TO JULY 31, 1966 — Calif. Production Sold in Calif.	Shipments into Calif.	Total Sales in Calif. — Barrels	Total Sales in Calif. — Percent of Total	YEAR TO JULY 31, 1965 — Calif. Production Sold in Calif.	Shipments into Calif.	Total Sales in Calif. — Barrels	Total Sales in Calif. — Percent of Total	Calendar Year to 7/31/66-7/31/65 — Increase or Decrease — Barrels	Increase or Decrease — Percent
1. Adolph Coors	—	966,656	966,656	16.5%	—	910,411	910,411	16.6%	56,245	6.2%
2. Olympia Brewing	—	875,228	875,228	15.0	—	780,209	780,209	14.2	95,019	12.2
3. Jos. Schlitz	751,853	4,113	755,966	12.9	630,018	14,800	644,818	11.7	111,148	17.2
4. Anheuser-Busch	728,629	5,185	733,814	12.6	684,495	4,438	688,933	12.5	44,881	6.5
5. Theo. Hamm	641,385	169	641,554	11.0	564,187	—	564,187	10.3	77,367	13.7
6. General Brewing	581,325	21,937	603,262	10.3	569,342	128	569,470	10.4	33,792	5.9
7. Pabst Brewing	326,289	179	326,468	5.6	350,396	65	350,461	6.4	—23,993	— 6.8
8. Maier Brewing	272,393	—	272,393	4.6	315,966	—	315,966	5.7	—43,573	—13.8
9. Falstaff Brewing	181,401	—	181,401	3.1	166,408	—	166,408	3.0	14,993	9.0
10. Miller Brewing	—	168,446	168,446	2.9	—	180,614	180,614	3.3	—12,168	— 6.7
11. National Brewing	—	61,923	61,923	1.0	—	32,869	32,869	0.6	29,054	88.4
12. Grace Bros.	56,863	—	56,863	1.0	75,569	—	75,569	1.4	—18,706	—24.8
13. Pearl Brewing	—	52,381	52,381	0.9	—	52,080	52,080	0.9	301	0.6
14. Sicks' Rainier	—	33,386	33,386	0.6	—	37,434	37,434	0.7	— 4,048	—10.8
15. Carling Brewing	—	16,236	16,236	0.3	—	27,033	27,033	0.5	—10,797	—39.9
16. Steam Beer	707	—	707	0.0	509	—	509	0.0	198	38.9
17. Other US Co.'s	—	54,652	54,652	0.9	—	59,268	59,268	1.1	— 4,616	— 7.8
18. Outside USA	—	44,727	44,727	0.8	—	36,064	36,064	0.7	8,663	24.0
Total Sales	3,540,845	2,305,218	5,846,063	100.0%	3,356,890	2,135,413	5,492,303	100.0%	353,760	6.4%
Percentages	60.6%	39.4%	100.0%		61.1%	38.9%	100.0%			